SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1940

S. Mayner Wallace
Petitioner
vs. No. .....

Johanna F. Fiske, *et al.*

S. Mayner Wallace
Petitioner
vs. No. .....

Johanna F. Fiske, *et al.*

Petition for (Two) Writs of Certiorari
to the
United States Circuit Court of Appeals
(Eighth Circuit)
and
Brief in Support

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Petition for (Two) Writs of Certiorari to the United States Circuit Court of Appeals (Eighth Circuit)

May it please the Court:

The petition of S. Mayner Wallace respectfully shows to this Honorable Court that:

A judgment, in the Court of Appeals, dismissing a cross-appeal (for want of jurisdiction) and refusing to dismiss (and affirming) the main appeal, is here submitted for review.

Summary and Short Statement of the Matter Involved

This application deals with the effect of the FEDERAL RULES OF CIVIL PROCEDURE on a party's right to appeal from the District Court to the Circuit Court of Appeals within the 10-day period after judgment during which time, by those RULES, a motion to amend the judgment or a motion for a new trial may be made by such a party's adversary.

(Filed herewith is petitioner's MOTION for leave to dispense with the printing of unnecessary parts of a lengthy record in the Court of Appeals.)

The facts are:

Petitioner, S. Mayner Wallace, sued respondents (Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide M. Zimmermann, Otto B. Franz, Arthur U. Simmons, Adm'r. c. t. a. of the estate of Gustav A. Franz, dec'd., Sherman H. Kleinschmidt and Helen Kleinschmidt) in the District Court for the Eastern Judicial District of Missouri, to recover compensation for certain legal services.

Judgment for petitioner was entered on March 30, 1940 (R. 8).

Within 10 days thereafter, on April 9, petitioner (asserting the judgment was inadequate in amount) filed his motion (R. 10) to amend that judgment—pursuant to RULE 52 (b) of the FEDERAL RULES OF CIVIL PROCEDURE.

Two hours and 5 minutes prior thereto (in the same day) respondents had filed, in the clerk's office of the District Court, their notice (R. 9) of appeal from that judgment—pursuant to RULE 73 (a).

Petitioner's said motion was entertained by the District Court; and argued, submitted and overruled there on July 25th following (R. 12).

Thereupon, on the 29th of July, petitioner filed his notice (R. 13) of appeal from said judgment—also pursuant to said RULE 73 (a).

The Court of Appeals denied (R. 21) petitioner's motion to dismiss said appeal (numbered 11,775 therein) of the respondents. The motion (R. 17) assigned that, under the RULES, that appeal was prematurely taken from a non-final judgment.

The Court of Appeals, at the same time, sustained (R. 20) a motion of the respondents to dismiss petitioner's said cross-appeal (numbered 11,807 therein). That motion (R. 14) assigned that that cross-appeal was not taken within the statutory 3 months from said March 30th, the date of judgment.

The opinion (R. 22) of the Court of Appeals (on those motions) proceeded upon the view that "the mere existence" of the right of a party, under the RULES, to move, within 10 days, against a judgment, does not deprive the other party "of the right to take an appeal" immediately upon the entry of judgment; and that respondents' appeal, having been taken 2 hrs. & 5 min. prior to the filing of petitioner's motion to amend, was good, and, also, that the petitioner should then have gone to the Court of Appeals and moved for a remand for the consideration of his said motion to modify the judgment.

Thereupon, during the same (November) term, the Court of Appeals proceeded to a hearing of respondents' said appeal upon the merits; and affirmed (R. 48) the said judgment.

Petitioner's contention is that the Court of Appeals dismissed the wrong appeal; that that Court had no jurisdiction of respondents' said appeal and should have dismissed the same; and that that Court should now be directed to hear petitioner's said cross-appeal.

That contention is bottomed upon the FEDERAL RULES OF CIVIL PROCEDURE providing a 10-day period, after judgment, for moving against the judgment; but it will be observed that the same result should follow if the law's traditional disregard for fractions of a day be applied because, in that event, it results that respondents' said notice of appeal never possessed any legal significance.

Jurisdictional Statement

The opinion of the Court of Appeals, on the motions to dismiss the appeal and cross-appeal, is reported in 115 F. (2d) 1003, while the opinion of that Court, affirming the judgment of the District Court, is reported in 117 F. (2d) 149.

A petition for rehearing, following the said judgment of affirmance on January 31, 1941, by the Court of Appeals, was denied on March 5, 1941 (R. 57).

The statutory provisions, believed to sustain the jurisdiction of this Court, are: section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938 (28 USCA sec. 347) providing for review by certiorari, and Revised Statutes, section 1008, as amended by section 8 (a) of the Act of February 13, 1925, 43 Stats. 940 (28 USCA sec. 350) requiring that an application for certiorari be duly made "within three months after the entry" of judgment; and it is held (*Gypsy Oil Co. v. Escoe*, 275 U. S. 498) that that time runs from the denial of a seasonably filed and entertained petition for rehearing.

While such motions, as those below, are frequently reserved and ruled upon when the whole case is decided, yet it is respectfully submitted that the fact that the motion to dismiss petitioner's cross-appeal was sustained and the motion to dismiss respondents' appeal was denied by the Court of Appeals on November 16, 1940 (R. 20 & 21) is of no consequence in relation to the present jurisdiction of this Court. In other words, the orders, on those motions, did not become final, for review on certiorari, until said March 5, 1941.

The refusal of the Court of Appeals to dismiss the respondents' appeal could not have been reviewed here until after said March 5; and the same is therefore necessarily

true of that Court's dismissal of the petitioner's cross-appeal.

A case, sustaining the jurisdiction of this Court respecting said cross-appeal, in such circumstances, is:

Mountain Min. Co. v. St. Louis Min. & Mill. Co. and *Mountain Min. Co. v. St. Louis Min. & Mill. Co.*, 186 U. S. 24

The two said appeals to the Court of Appeals below, having been taken more than 3 months apart, could not both be good. A determination that either one was good necessarily meant that the other one was not.

So long as the Court of Appeals retained jurisdiction and considered the merits, that Court could, of course, have changed its view of the validity of those two appeals; and, on said March 5, a change of view by that Court of the validity of respondents' said appeal would automatically have resulted in a change of view with respect to the validity of petitioner's said cross-appeal.

All of the rulings of the Court of Appeals acquired the element of finality during its November, 1940, Term.

The order, on said November 16, sustaining respondents' motion to dismiss petitioner's said cross-appeal was interlocutory and, for that and the other reasons herein advanced, was not reviewable sooner here.

Moreover, had this Court granted a certiorari to review the validity of petitioner's said cross-appeal, immediately after said November 16, a review of the same judgment would then have been pending here and, also, in the Court of Appeals at the same time. That, of course, is not admissible.

The want of finality, in the order dismissing petitioner's cross-appeal, would have made an application for certiorari, prior to said March 5, to review that order, subject

to denial; while the failure of the petitioner sooner to apply here for a review of that interlocutory order was not laches (*John Simmons Co. v. Grier Bros.*, 258 U. S. 82, 91).

(Additional authorities are cited, *infra*, in the annexed Brief.)

The Questions Presented

The questions presented by this application for certiorari are:

I

May an appeal validly be taken by a party to a Circuit Court of Appeals from a judgment of a District Court within the 10-day period after judgment, during which period the adversary party is accorded the right, under RULES 52 (b) and 59 (b) of the FEDERAL RULES OF CIVIL PROCEDURE, to move to amend the judgment or to move for a new trial?

In other words, is any such attempted appeal premature as being from a non-final judgment?

II

Regardless of the answer to the foregoing, is such an appeal, taken during the 10th day after judgment, but 2 hrs. & 5 min. before the filing during that day by the adversary party of such a motion to amend, valid in the light of the law's usual disregard for fractions of a day?

Reasons Relied On For Allowance of the Writ

I

The terms of RULE 52 (b) of the FEDERAL RULES OF CIVIL PROCEDURE, read in the light of its legislative history, demonstrate, *conclusively and expressly*, that the said judgment of the District Court did not become final (and was,

therefore, non-appealable) during the 10-day period immediately following its entry.

RULES 59 (a & b), 59 (d), 60 and 62 (a), as finally adopted, all point to the same end.

(The foregoing is briefed in the annexed Brief.)

The opinion (R. 22) of the Court of Appeals, now also reported in 115 F. (2d) 1003, holding that such a judgment, for appeal purposes, nevertheless became final immediately upon its entry, represents, so far as we are aware, the only judicial consideration that this subject-matter has so far received; and, therefore, it is respectfully submitted that, within the language of RULE 38 (5-b) of this Court, the Court of Appeals has "decided an important question of Federal law which has not been, but should be, settled by this Court."

II

The ordinary disregard of the law for fractions of a day required, in and of itself, in said circumstances, the invalidation of respondents' appeal and, thereby, the automatic validation of petitioner's cross-appeal.

(This matter is also briefed in the annexed Brief.)

Prayer

WHEREFORE, your petitioner respectfully prays that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the eighth circuit, commanding that Court to certify and send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the records and all proceedings (or such parts thereof as may be permitted by this Court pursuant to petitioner's certain MOTION, filed

with this Petition, to dispense with unnecessary printing) in the cases numbered and entitled (on the docket of said Court of Appeals) 11,775—"Johanna F. Fiske, *et al.*, appellants, vs. S. Mayner Wallace" and 11,807—"S. Mayner Wallace, appellant, vs. Johanna F. Fiske, *et al.*"; and that the judgment of said Circuit Court of Appeals refusing to dismiss said appeal No. 11,775 and the judgment of said Court of Appeals dismissing said cross-appeal No. 11,807 be reversed by this Honorable Court and that said Court of Appeals be directed to dismiss said appeal No. 11,775 and to hear and decide said appeal No. 11,807 upon the merits thereof and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

S. Mayner Wallace
Petitioner

by
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St. Louis, Mo.
May, 1941